

1932 Present : Macdonell C.J., Garvin S.P.J., and Dalton J.

HUSSAN v. PEIRIS *et al.*

209—D. C. Kalutara, 14,612.

Jurisdiction—Partition action—Several defendants—Residence—Test of jurisdiction—Any defendant—Courts Ordinance, s. 65 and Civil Procedure Code, s. 9 (a).

An action may be brought in a District Court where any party defendant resides, viz., any defendant against whom the right to any relief is alleged to exist.

A party defendant in section 65 of the Courts Ordinance and in section 9 (a) of the Civil Procedure Code means any party defendant.

THIS was an action in which the plaintiff sued the defendants all resident within the jurisdiction of the District Court of Kalutara to partition a land, situate at Beruwala, a place beyond the jurisdiction of the Kalutara Court. The intervenients, who were residents at Beruwala, claimed a portion of the land and pleaded that the Court had no jurisdiction. The District Judge upheld the plea and dismissed the action.

N. E. Weerasooria (with him *D. E. Wijewardene*), for plaintiff-appellant.—There is no question that the District Court of Kalutara had jurisdiction at the commencement of the action as the plaintiff and all the defendants were resident at Kalutara. Jurisdiction is conferred on a District Court by section 65 of the Courts Ordinance, and section 9 of the Code. The word used is “a party defendant”. The Charter (section 24) says “the party or parties defendant”. In section 65 of Ordinance No. 11 of 1868, the words used are “the party defendant”. This must be construed with Ordinance No. 1 of 1852 (Interpretation Ordinance) which says that the singular includes the plural. A distinction has therefore been drawn by the use of the words “a party defendant”. This was presumably copied from the Indian Act of 1882, section 17. The change was introduced deliberately. Section 77 of the Courts Ordinance, which confers jurisdiction on a Court of Requests, says “the party or parties defendant”. The word “a” in a statute means “any”, *Queen v. Justices of Durham*¹. A court has jurisdiction where one defendant resides within its jurisdiction, *Tirimandura v. Dassanaike*², *Mohamedu Meera v. Ossen Saibo*³. A partition action is an action regarding title plus proceedings for partition.

H. V. Perera (with him *J. R. Jayawardene*), for intervenient-respondents.—Partition actions cannot be brought except where the land is situated. If property is situated outside, a court has no jurisdiction even if all the defendants reside within its jurisdiction. A partition decree gives title good against the whole world. A plaintiff is merely an applicant for partition. He cannot claim relief against the defendants as in an ordinary action. Every party to a partition action is an applicant for the allotment of a particular lot to him, absolutely and not as against

¹ (1895) 1 Q. B. 801.

³ *Lem. 51.*

² 2 N. L. R. 290.

any particular person. Disputes are merely incidental to the proceedings. They are allowed because the court must decide who has title (*Jayewardene* 59; *Digest* 2, 1, 11, 2; *Voet* 2, 1, 49). Section 2 of the Partition Ordinance which deals with jurisdiction makes no reference to defendants. Defendants in partition actions are defendants in name only; they are not in the same position as defendants in an ordinary action. The plaintiff merely names the parties interested in the land. A partition action is a proceeding *in rem*, *Mather v. Thamotheram Pillai*¹. An action which results in a decree *in rem* must be brought where the thing is, *Hukm Chand* 516.

[Macdonell C.J.—Take the case of a ship wrecked on the east coast. The interested parties are in Colombo. Can they not bring the action in Colombo?]

In the case of movables there is a fiction by which they are brought within the constructive jurisdiction of the court, *Hukm Chand*, s. 204. A party defendant in the Courts Ordinance means a defendant against whom there is a cause of action. A plaintiff may make a person a defendant who might himself have been a co-plaintiff, e.g., if he refuses to join as plaintiff. Would his residence be a test if “a party defendant” means “any”? The defendant must be a true defendant. There must be a cause of action against him, *Baker v. Wait*². In a partition action the rôles of plaintiff and defendant are reversible. Not so in an ordinary action. A defendant in a partition action cannot therefore be said to be a defendant within the meaning of the Courts Ordinance.

Weerasooria, in reply.—A party to a partition action other than the plaintiff is really a defendant in every sense of the term. Even otherwise, he is in fact called a defendant. Once he is called a defendant he comes within the operation of section 65. Section 14 of the Code suggests a definition of defendant. There can be a right to relief without a cause of action. In a partition action, there is clearly a right to relief, see section 6. It is true that every party to a partition action is in the position of a plaintiff but he is also in the position of a defendant. A partition decree is not a decree *in rem*. It is only in the nature of a decree *in rem* (*Hukm Chand* 493). Even if it is a judgment *in rem*, the court has constructive possession of the thing. (*Hukm Chand* 520.)

December 9, 1932. MACDONELL C.J.—

This was an action in which the plaintiff-appellant and the seven defendants, all resident within the jurisdiction of the District Court of Kalutara, sought to partition a land at Beruwala, situate beyond the jurisdiction of that court. Two persons resident in Beruwala, the respondents on this appeal, intervened, claiming a portion of the land to be partitioned and pleaded that the court had no jurisdiction. The District Judge dismissed the action on that ground, want of jurisdiction, and from this dismissal plaintiff brings the present appeal. It was referred by Drieberg J. to a bench of three Judges because of two apparently conflicting decisions. In *Fernando v. Waas*³, it was held that an action could be brought in the court within the jurisdiction of which

¹ 6 N. L. R. 246.

³ (1891) 9 S. C. C. 189.

² (1869) 9 Equity 103.

one of several defendants resided, though that court would not have jurisdiction over the land or the party in possession if sued alone, Civil Procedure Code, section 9 (b), (c) and (d). In *Tirimandura v. Dissanaiké*¹, it was held, in effect, that to satisfy the requirements of section 9 (a) all the defendants should reside within the jurisdiction of the court, if it was sought to get a judgment against all of them.

The appeal necessitated the interpretation of the words "a party defendant" in section 65 of the Courts Ordinance, No. 1 of 1889, and in section 9 (a) of the Civil Procedure Code, also a decision on the nature and proper description of parties to a partition action.

For the appellant, it was contended that the words in the sections just cited "a party defendant" mean any party defendant, and that consequently a District Court has jurisdiction if any party sought to be made a defendant resides within its district. I think the contention that "a" here means "any" is right, but it is as well to examine the authorities on which it is put forward. The Interpretation Ordinance, No. 21 of 1901, section 3 (23), says "words in the singular number shall include the plural and *vice versâ*", and a similar provision existed in Ordinance No. 1 of 1852 which it replaced. Section 65 of the repealed Administration of Justice Ordinance, No. 11 of 1868, spoke of "the party defendant resident within the district", and this phraseology has been retained for Courts of Requests in section 77 of the Courts Ordinance which says "Every Court of Requests . . . shall have cognizance of . . . all actions (within a certain figure) . . . in which the party or parties defendant shall be resident within the jurisdiction of such court", but section 65 of the same Ordinance in defining the jurisdiction of District Courts says "Every District Court shall have cognizance of . . . all pleas, suits, and actions in which a party defendant shall be resident within the district in which any such suit or action is brought", and section 9 (a) of the Civil Procedure Code repeats this provision. There has been then an alteration in the law to which effect must be given. Several English cases were cited to us in support of the contention that "a" means "any". Thus in *Reg. v. Justices of Durham*² a case under the Summary Jurisdiction Act, 1879, section 31 (3) which required an appellant to "enter into a recognizance before a court of summary jurisdiction" to prosecute an appeal, it was held that "a court" meant "any court". In *In Re Saunders*³, a case under the Agricultural Holdings Act, 1883, section 52, which enacted that a bailiff was not to levy distress unless authorized "by a Judge of a County Court", it was held that these last three words meant "any County Court". Again in *Reg. v. School Board of London*⁴, where the Valuation (Metropolis) Act, 1869, section 4, defined "gross rent" as "the annual rent which a tenant might reasonably be expected . . . to pay for an hereditament", it was held that "a tenant" meant "any tenant". These decisions certainly serve to support the remarks of Burnside C.J. in *Fernando v. Waas* (*supra*), to the effect that, "one of the defendants, 'a party defendant', resides within the jurisdiction of the court, and the court therefore has jurisdiction over the matter in that suit".

¹ 2 N. L. R. 290.

² (1895) 1 Q. B. 801.

³ 54 L. J. Q. B. 331.

⁴ 17 Q. B. D. 738.

These cases, and none was cited to us to the contrary, seem to establish that “a defendant” in the sections in question means “any defendant”, and that consequently if any party defendant to an action resides within a particular district, action may be brought against him in the District Court of that district; one of the four jurisdictional features—if the expression be permitted—required by section 9 of the Civil Procedure Code is present, consequently the action may be brought there.

More difficulty will be found in determining what the words “party defendant” mean. I will consider the meaning of these words first in relation to the particular form of action before us, and then generally. This was a partition action and it was contended for the respondent that in such an action there are no defendants in the proper sense of the term, consequently that the provisions as to “a party defendant” in section 65 of Ordinance No. 1 of 1889, and in section 9 (a) of the Civil Procedure Code have no application where the action is one for partition, and that a partition action must be brought in the district where the land to be partitioned is situate and not elsewhere. In the present case there was, it was argued, an inherent want of jurisdiction, a defect which could not be waived; see *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.*¹ This contention was supported by a number of authorities and requires examination.

In the first place it has been decided definitely that a partition action is a proceeding coming within the meaning of the word “action” as given in section 3 of the Courts Ordinance, No. 1 of 1889, and in section 5 of the Civil Procedure Code, that is, “a proceeding for the prevention or redress of a wrong”, per Shaw J. in *de Silva v. de Silva*². “I think that a partition action may fairly be said to be a proceeding taken for the prevention or redress of a wrong. That suits for partition are intended by the Ordinance itself, No. 1 of 1889, to come within the definition of actions, seems clear from section 77 where they are referred to as such”, and see also *Soisa v. Sepohamy*³. As to the parties to such an action, each partakes of the character of a plaintiff in so far that if he seeks any share or interest in the land being partitioned, he must prove his right to the same strictly; this I take to be the meaning of the words of Bertram C.J. in *Lucihamy v. Hamidu*⁴. “It has been repeatedly referred to in our books as an action in which every party is really a plaintiff”. But this does not exclude parties to that action from partaking of the character of defendants, as indeed the plaintiff himself may do in so far as he seeks to resist the claims of others to a share or interest in the land. The passage from Voet X. 1, 3, quoted in the case just cited puts this quite clearly. “*In ea singulae personae duplex ius habent, puta, agentis, et eius cum quo agitur*”. The passage cited to us from Gaius in the *Digest V. 1, 13*, to show that there are no defendants in partition actions, really tells the other way. It is as follows:—“*In tribus istis iudiciis, familiae erciscundae, communidividundo, et finium regundorum, quaeritur quis actor intelligatur quia par causa omnium videtur. Sed magis placuit eum videri actorem qui ad iudicium provocasset*”, whence it would follow that “*eum qui ad iudicium provocatus esset*”, will be “*eo cum quo agitur*”, i.e., a defendant. And note that pretty much the same point

¹ (1916) 2 A. C. 298.

² 3 C. W. R. 318.

³ 3 App. C. Rep. 93.

⁴ 26 N. L. R. at 46.

seems to have been raised for Gaius' opinion as that before us; "*par causa omnium*", each party has an interest and must prove it. Section 14 of the Civil Procedure Code says "All parties may be joined as defendants against whom the right to any relief is alleged to exist". Tested by this, I do not think it can be maintained that a person made a defendant in the caption to a partition action is not a defendant in the proper sense of the word, and he does not seem not to be defendant because when the time comes for him to establish his own claim to a share of or interest in the land, he has to take on him the *persona* of a plaintiff. One can take the simplest form of a partition action to demonstrate this. A and B claim to be, and admit each other to be, owners in common in half shares of land X, and they agree that they will partition X and that A shall be the plaintiff, and A files action accordingly making B sole defendant. The friendly nature of the action does not prevent it being, in final analysis, an allegation by A that he has a right, that such right exists, to relief as against B. If he makes out his case to the moiety he claims, and which B admits to be his, still he will have got the declaration of a court of his indisputable right to that moiety against all the world including B. At the moment he has a right only to an undivided moiety on to which B may lawfully come at any time and over which B has the rights of an owner *frui utendi abutendi*. After partition decree, those rights of B to A's undivided moiety will have disappeared, A can enclose that moiety against all the world including B, a right or relief which he certainly did not possess while it was still undivided, prior, that is, to the partition decree. If this then is the case with the simplest conceivable form of partition action—a half share admitted by each of two co-owners—it will certainly be so *a fortiori* in every partition action which is in ever so slight a degree more complex or less undisputed than the instance one has taken. It is certainly germane to this question to note the language of the Partition Ordinance, No. 10 of 1863, itself, since this speaks definitely of the party instituting the action as "plaintiff" and of the other parties specified by him as "defendants", sections 3 and 4, nor does there seem any reason for refusing to hold that the "defendant" to a partition action, is a defendant in the proper sense of the term. The fact that during that action he will at a certain stage or stages have to take upon him the character of a plaintiff, does not prevent this.

In the main the argument, want of jurisdiction, proceeded on the ground that a partition decree was a judgment *in rem*, and that consequently a partition action could be brought only in the jurisdiction where the *res* was situate, but I understood in the end that this contention was abandoned.

To return to the question of the meaning of the words "a party defendant". Section 14 of the Civil Procedure Code speaks of a defendant as one "against whom the right to any relief is alleged to exist". Then the term "party defendant" will not include a person who is made a defendant because he should have joined as plaintiff but declined to do so, nor will it include a person made a party for the reason only that this is necessary for the proper constitution of the action but not because any relief against him is claimed by the plaintiff. Further: if a "party defendant" means one "against whom the right to any relief is alleged

to exist", this definition of the term will prevent a plaintiff commencing an action in a particular district against one residing in the same who is in the same interest as the plaintiff and is therefore only a nominal defendant—one who in *Baker v. Wait*¹, was described as "a pocket defendant"—whereby he would compel, by a side wind, the real defendant, the one against whom a right to relief was alleged to exist, to come and be sued out of his own district. An instance of this would be where a first mortgagee commenced action in his own district against a puisne mortgagee who was resident therein, making him defendant to found jurisdiction, although the mortgagor might be resident in another district, and another instance would be an action on a negotiable instrument where the holder of the instrument brought action in the court of the district where the drawer was resident, the drawer being, let us suppose, entirely in his, the plaintiff's interest, while the parties against whom the relief was really sought, the acceptor and indorsers, resided in another district. These were pretty much the facts in *Baker v. Wait*, cited *supra*, per James V.C. "If the plaintiff having only, as he may be called, this 'pocket' defendant of his own within this district, were to go on with a plaint filed in the County Court of this district, in which none of the other defendants reside, I should not hesitate to say that all orders made in such a matter would be wholly void and of no effect". In any case section 46 of the Courts Ordinance seems adequate to check this mischief. The real defendant, the one, that is, against whom right to a relief was alleged to exist, could apply to have the action struck out on the ground that he was not a party defendant within the meaning of section 65 of the Courts Ordinance or of section 9 of the Civil Procedure Code. or, if he preferred, could apply for the transfer of the case to the court of the district where he himself resided, and in that case the plaintiff who had summoned him to the court of a district where he did not, could be ordered to pay costs. There are also the powers given by section 18 of the Civil Procedure Code as to parties improperly joined.

This, then was an action which could properly be brought in the court where it was instituted since a party defendant thereto resided in the district of that court. The law does not require a partition action to be brought in the District Court of the district where the land is situate. The repealed Partition Ordinance, No. 21 of 1844, enabled it to be brought in "any District Court having jurisdiction", section 10, and the existing Partition Ordinance, No. 10 of 1863, enables it to be brought "in any court of competent jurisdiction", section 2, and in this connection section 77 of the Courts Ordinance, No. 1 of 1889, giving jurisdiction to Courts of Requests is important. These courts have jurisdiction in partition actions, subject to a limit as to value, where "the land . . . or any part thereof is situate within the jurisdiction of such court". No such restriction as to locality is placed by section 65 to the jurisdiction of a District Court and by virtue of that section and of section 9 (a) of the Civil Procedure Code, it is "a court of competent jurisdiction" in partition actions if any party defendant thereto resides within its jurisdiction. It is possible that this is a provision which is open to inconveniences, and that it would be better if all partition actions

¹ L. R. 9, Eq. 103.

had to be brought in the court of the district where the land is situate, subject to the powers of transferring actions given by section 46 of the Courts Ordinance, but that is not the law at present.

I would answer both the questions raised by this appeal in the appellant's favour. "A party defendant" in section 65 of the Courts Ordinance and in section 9 (a) of the Civil Procedure Code means, "any party defendant", and a partition action may be brought in any District Court wherein any party defendant resides, meaning by those words, any defendant against whom the right to any relief is alleged to exist.

For the above reasons I am of opinion that this appeal should be allowed with costs here and below and that this action should be reinstated for hearing in the District Court, Kalutara, with liberty to plaintiff to recall any witnesses already examined, himself included.

DALTON J.—

The District Judge has held that he had no jurisdiction to try this case, since the eighth defendant lives outside the jurisdiction of his court. His conclusion is supported by the decision in *Tirimandura v. Dissanaiké*¹, whereas an earlier decision of this court, in *Fernando v. Waas*², is against him. After consideration of the arguments and the authorities put before us I have no doubt that the latter and earlier decision is the correct one. I feel compelled to read section 9 (a) of the Civil Procedure Code as meaning what it seems to me to say, namely, that an action may be instituted in the court within the local limits of whose jurisdiction "a party defendant" resides. I am unable to interpret this as meaning "a party defendant or parties defendant", as was held in *Tirimandura v. Dassanaiké (supra)*.

Mr. Perera sought to show, however, that neither case, whichever might be held to be correct, had any application in a partition action, which in its result is in the nature of a proceeding *in rem*. In that event he urged the property to be partitioned must be situated within the local jurisdiction of the court, before which the action is brought.

A partition suit, under the Partition Ordinance, is an action under the Civil Procedure Code and the Courts Ordinance, and the Partition Ordinance and the Code must be worked together. There are numerous authorities for this (see *Jayewardene on Partition*, pp. 17-19, 337. I have heard nothing to satisfy me that the provisions of section 9 of the Code do not apply to a partition action. It is to be noted that in the case of the Court of Requests, section 77 of the Courts Ordinance, 1889, provides amongst other things that such courts shall have jurisdiction in partition suits provided the land or any part thereof is within the jurisdiction of the court. There is no such limitation in regard to the jurisdiction of District Courts.

It has been pointed out that in partition actions each party has the double capacity of plaintiff and defendant. There is no question as to the correctness of that argument. It is therefore necessary for the court to be satisfied in any such action, where one person who is named as a defendant resides within the jurisdiction of the court where the action is brought, that that person is a real or substantial defendant, and not a

¹ 2 N. L. R. 290.

² 9 S. C. C. 189.

mere "pocket" defendant within the jurisdiction set up by plaintiff for his own purposes, as mentioned in *Baker v. Wait*¹. Subject to that, where a party defendant in a partition action resides within the jurisdiction of the court, other defendants residing outside its jurisdiction, and although the land may not be within the local jurisdiction, the District Court nevertheless has jurisdiction.

In the case before us, although the eighth defendant, the respondent to this appeal, lived outside the jurisdiction of the court, and the land is also outside its local jurisdiction, nevertheless the original defendants lived within the jurisdiction, and there is nothing before us to suggest they were not substantial defendants, or that they were put up by plaintiff as dummies for the purpose of maintaining his action in the court where it was instituted. The giving of security for costs in the case of non-residence is amply provided for in the Code.

I would, for the reasons I have given, in answering the reference hold that the decision in *Fernando v. Waas* (*supra*) was rightly decided on the question of jurisdiction.

The appeal must therefore be allowed, with costs, and the decree entered dismissing plaintiff's action must be set aside. The action must be remitted for further hearing.

GARVIN S.P.J.—I agree.

Appeal allowed.

